Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

IN THE HUSTINGS COURT OF THE CITY OF PETERSBURG.

THOMAS C. JOHNSON, Adm'r of Matilda A. Young, deceased, WILLIAM C. COLEMAN et al.

1. **Mortgages—Proceeds of Sale.**—When there is a sale of real estate under a mortgage or deed of trust, after the death of the mortgagor, the surplus goes to his heirs, unless the mortgage otherwise provides.

2. **Executors and Administrators—Real Assets.**—Real assets often come to the hands of the personal representative, and it is his duty when he receives such to pay the same to such persons as are entitled thereto. They are, however, assets in his hands, the same as personal assets, for the payment of the decedent's debts, and need not be distributed as personalty.

3. **Mortgages—Proceeds of Sale.**—The expression in § 2442 of the Code, "unless the deed of trust otherwise directs," has no reference as to whom the surplus goes, but merely to the manner of making sale and of commission for selling.

4. **Conversion—Direction for Sale.**—For a deed or sale to convert land into money the direction to sell must be absolute and unconditional; the instrument must contain an imperative direction to sell the real estate; for if the power to sell requires for its execution the consent or request of the parties interested there is no conversion unless such request is made or consent given.

5. **Mortgages—Proceeds of Sale.**—Where there is a sale under a mortgage or deed of trust in the lifetime of a mortgagor, the surplus, after payment of the debts, is personalty; but when a dead man's land is sold, no surplus goes to his heirs or devisees.

6. **Conversion—Time of Conversion.**—When a sale works a conversion, the conversion dates from the death of the testator; but when the sale is not obligatory, the conversion dates from the time of sale.

7. **Mortgages—Proceeds of Sale—Conversion.**—The intestate, being the owner in fee of certain real estate, conveyed the same by deed of trust to secure the payment of certain indebtedness therein set out, and with power to the trustee to sell the same upon default of such payment, when requested by the holder of the note secured, and after applying the proceeds of sale to the payment of indebtedness and costs of sale, the balance, if any, to pay over to the intestate, her personal representative or assigns; the trustee after the death of the intestate sold the property under the deed of trust and turned the proceeds over to the administrator; the heirs at law of the intestate claimed that the fund is realty and should be paid to them, but the distributee claimed that it is personalty and that payment of the debts of intestate should be paid to him. Held, when the sale was

made, as the equity of redemption belonged to the heirs, their estate was not divested; that while the sale converted the realty into personalty, this did not change the ownership of the surplus, which belonged to the persons who had the right at the time to redeem, namely, the heirs of the grantor.

OPINION OF THE COURT.

MULLEN, Judge. In 1910, Matilda A. Young (then Goodwyn), being the owner in fee of certain real estate in the City of Petersburg, conveyed the same by two deeds of trust to secure the payment of certain indebtedness therein set out, and with power to the trustee to sell the same upon default in such payment, *"whenever requested by the holder of the note"* secured, and after applying the proceeds of sale to the payment of the indebtedness and costs of sale, "the balance, if any, pay over to the said Matilda A. Goodwyn, *her personal representatives or assigns.*"

The said Matilda A. Goodwyn (then Young) died February 20th, 1913, intestate; and shortly after her death, to-wit, on May 3, 1913, the trustee, after due advertisement, sold the aforesaid real estate under the aforesaid deeds of trust. After payment of the debts secured thereby and the cost sale, there remained in his hands from the proceeds of sale a balance of $507.88, which balance was by the trustee turned over to the complainant, Thomas C. Johnson, as the administrator of the estate of Matilda A. Young, deceased, he having qualified as such.

The said decedent died without ever having had issue born alive, and leaving her surviving as her only heirs at law two brothers, William C. Coleman and Joseph Coleman, and two sisters, Lucy A. Stewart and Chailotte G. Brown, all of the whole blood, and James M. Coleman, a brother of the half blood, and Merritt Young, her husband, as her sole distributee, all of whom, including those representing James M. Coleman, who died February 21, 1913, have been made parties defendant.

The complainant brings this suit that he may be advised as to the disposition of this $507.88; the heirs at law of his intestate claiming that said fund is realty and should be paid to them; and her sole distributee insisting that it is personalty, and that the surplus, after payment of the debts of the intestate by her personal representative, should be paid to him. These respective claims are set up in the respective answers of the defendants.

On January 27, 1915, a decree was entered herein referring this cause to a commissioner of this court to take an account of the debts of the decedent, and of the transactions of her said administrator. The commissioner filed his report March 15, 1915, from which it appears that the administrator, Thomas C. Johnson, has in his hands a balance of $248.87, after retaining

$185.18 to pay the debts proved, $92.55 for costs of suit, $29.49 his commission, and eighty-seven cents to pay this year's taxes.

It is conceded that, but for the directions in the deeds of trust to the trustee to pay over any balance in his hands, after the satisfaction of the debts secured and the costs of sale, to "her (Matilda A. Goodwyn's) personal representatives", the fund in question must be considered realty, to which the heirs at law would be entitled; it being well settled that, "when there is a sale of real estate under a mortgage or deed of trust, *after the death of the mortgagor,* the surplus goes to his heirs, unless the mortgage may otherwise provide." But the contention of the husband, who is the sole distributee of the intestate, is that, by the use of these words "personal representatives", and the failure to use the word "heirs", as is ordinarily done in such conveyance of realty in providing for the distribution of the balance or surplus, the grantor by her deed directs that, whenever there is a conversion by sale, the surplus is to be paid over to her administrator or executor, to be by him administered and distributed as personalty.

This contention may be only correct in part, that is, the payment of the surplus by the trustee to the *personal representative.* Real assets often come to the hands of the personal representative; and it is made his duty when he receives such, by virtue of his office, to pay the same to such persons as are entitled thereto (Code, § 2664). They are, however, assets in his hands, the same as personal assets, for the payment of the decedent's debts (Code, §§ 2665-6; Smith's Ex. *v.* Smith, 17 Gratt. 268, 277). So there is nothing in the contention that when assets come to the hands of the personal representative they must be distributed as personalty, nor does the expression in § 2442, "unless the deed of trust otherwise directs," have any reference as to whom the surplus goes, but merely to the manner of making sale and the commission for selling. As the deeds of trust or mortgages alluded to in this statute may embrace personalty as well as realty, it simply directs the surplus to be paid to the heir or personal representative as the case may be. Nor has Gallagher *v.* Rowan, 86 Va. 823, any application. It simply invokes a well settled principle as to the effect when the purpose of the conversion of realty into personalty only partially fails, and when the conversion must still be made by selling the land. There the *will directed* the conversion; and the parties interested as beneficiaries could only take the estate given them by the will, and in the kind and shape therein designated. In that case the legatee got money, and that by the express terms of the will.

It is conceded that the deeds of trust themselves did not create a conversion; and that, until a sale was actually made, the heirs

at law, to whom the equity of redemption descended, could have redeemed the land conveyed by paying the debts. Counsel deduce these principles, and correctly, from Evans *v.* Kingsberry, 2 Rand. 120. And it is true, as he also contends, referring to the same case, that, when a valid sale was made under the deeds of trust, and not until then, the surplus proceeds of sale would be personal property, *belonging to the persons entitled to redeem,* with these admissions, and they are properly made, he abandons his contention that this surplus belongs to the personal representatives for all purposes. In that case, the trustee sold the lands conveyed under the deeds of trust after the death of the maker of the deed of trust, but during the lifetime of the heir; and the court held that, if that had been a valid sale, the surplus of the proceeds would have gone, upon the death of the heir, to the heir's next of kin; but that sale was declared invalid, and when re-sold, the heir having died afterwards, the court held that the surplus from the re-sale went to her heir, and not to her next of kin.

In Meade *v.* Campbell, 2 Va. Dec. 672, 34 S. E. 30; which cites Evans *v.* Kingsberry, 2 Rand. 120, with approval, it is held that for the deed or will to convert land into money, the direction to sell must be absolute and unconditional. The instrument, whether will or deed, must contain an imperative direction to sell the real estate, in order for the instrument to convert it into money. If the power to sell requires for its execution the request or consent of the parties interested, there is no conversion unless such request is made or consent given. In that case, the executors were by the will authorized to sell certain real estate *on the request of the testator's wife.* It was held, if the widow made no request, the real estate retained its original character, and at testator's death, passed to his devisees as land. Where there is a sale under mortgage or deed of trust in the lifetime of the mortgagee, the surplus, after payment of the debts, is personalty; but when a dead man's land is so sold, any surplus would go to that man's heirs or devisees, Findley *v.* Findley (W. Va.), 26 S. E. 433, 434. When the sale is dependent upon the consent or request of the beneficiaries (in Gallagher *v.* Rowan the beneficiaries had no say in the matter), there is no conversion until the request is made or the consent is given. 7 Am. & Eng. Enc. Law 468. When the direction for sale is conditional, it is insufficient to work a conversion. Id. 469, citing Evans *v.* Kingsberry, 2 Rand. 120. Directions to sell if necessary to pay debts will not work a conversion. Pascalis *v.* Canfield, 1 Edw. Chy. (N. Y.), 201; Gill *v.* Blaney, 150 Pa. St. 264. When a will works a conversion, the conversion dates from the death of the testator. 7 Am. & Eng. Enc. Law, 469, citing Effinger *v.* Hall, 81 Va. 94. But when the

sale is not obligatory, the conversion only dates from the time of sale. Id. 470.

Now in Findley *v.* Findley (W. Va.), 26 S. E. R. 483, certain interest in land devised to the wife, an adult, and four minor children, was sold *in the lifetime* of all the parties interested. It was held that, as to the widow, this sale, which was by decree of court, converted the proceeds into personalty; and that, in the distribution of the fund, her administrator, she having died after the sale but before distribution, should have been made a party to the suit, as he was entitled to receive her part of the fund. The sale was made in her *lifetime*. Had the sale been made after her death, while the proceeds would have been personal property, they would have gone to the then owner of the land. When a dead man's land is sold under mortgage or deed of trust, any surplus would go to that man's heirs. Findley *v.* Findley, supra.

The attention of the court has just been called to a case from New York directly in point, Dunning *v.* Ocean National Bank, 61 N. Y. 497, 19 Am. Rep. 293, 298-9; and the court is much gratified to find that the reasons it has given for its conclusions are the same as those advanced by the New York court, especially those given in the concurring opinion.

It follows, therefore, that, when the sale in this case was made, as the equity of redemption belonged to Matilda A. Young's heirs, their estate was not divested. It is true the sale converted the realty into personalty, but this did not change the ownership of the surplus; it belonged to the persons who had the right at the time to redeem, namely, the heirs at law of Matilda A. Young, the grantor.

As there are no exceptions to the report of the commissioner, except as to who are entitled to this surplus, it is in all other respects confirmed.

Let a decree be entered, directing the payment of so much of the fund in the hands of the complainant not retained or needed to pay debts, costs of sale, etc., to-wit: $248.87 to the defendants, the heirs at law of Matilda A. Young, deceased, and out of which the costs of this suit are to be paid, but no attorney's fee is to be taxed therewith.

Note.

While the decisions do not take the trouble to trace the equity of redemption through the process of conversion and reconversion, where land is sold under a deed of trust after the death of the grantor, such equity is, in the first instance, necessarily converted by the sale into personalty in the nature of the proceeds, which in equity is reconverted into realty, unless the deed of trust otherwise provides, and descends to the heirs of the grantor. There is, beyond doubt, an actual conversion of the physical land into specific funds

by the sale, which in order to be treated as realty must be reconverted in equity.

A conveyance of land to trustees, with directions to sell and hold the proceeds to the benefit of the grantor or third persons, works a conversion when sold. M'Clanachan *v.* Siter, 2 Gratt. 294.

Where a mortgage deed contains a power of sale, with a direction that the surplus proceeds shall be paid to the mortgagor, his executors and administrators, if a sale takes place in the lifetime of the mortgagor, the surplus is personal estate; but if after his death, it is real estate. Wright *v.* Rose, 2 Sim. & St. 323, 57 Eng. Rep. 369. If the sale is made after the death of the grantor in the deed of trust, the equity of redemption descends upon the heirs and is subject to dower. 1 Minor on Real Property, § 602.

As stated in the opinion, the case of Dunning *v.* Ocean Nat. Bank, 61 N. Y. 497, 19 Am. Rep. 293, is in accord with the principal case. But the case of Varnum *v.* Meserve, 8 Allen (Mass.), 158, which is disapproved in the New York case, holds that if a power of sale contained in a mortgage of real estate, executed after the mortgagor's death which provides that the surplus of the proceeds, after payment of the debts and expenses, shall be paid to the mortgagor or his assigns, his executor may maintain an action therefor, although the mortgagor by will devised the land to others; and, upon recovery of it, will hold the same in trust, first, to the use of the widow, so far as she may be entitled thereto, in preference to creditors; secondly, for the payment of debts; and thirdly, to the uses of the will. Varnum *v.* Meserve, 8 Allen (Mass.), 158.

It is rather strange to notice that the New York case refuses to follow the Massachusetts case, because in Massachusetts an equity of redemption is a trust estate, while in New York it is a legal estate. In the course of the opinion in the New York case it is said of the Massachusetts case: "They recognize the doctrine that a surplus, under such circumstances, is usually real estate, but declare that the equity of redemption in mortgaged lands is but a trust estate, and that the legal title to the money is in the executor or administrator by force of the contract with the mortgagee, and that when he collects it he holds it in trust for the heirs or devisees, as the case may be. Varnum *v.* Meserve. These views cannot prevail here. The equity of redemption is a legal estate in New York. The case of Varnum *v.* Meserve is in direct opposition to Wright *v.* Rose, where the promise was also made to pay the mortgagor, his 'executors or administrators.'"

In Virginia the equity of redemption is considered an equitable estate, and yet the New York and not the Massachusetts case is followed. This, however, is unimportant because in this state an heir may take and there may be dower in an equitable estate.

The principal case applies the rule that where there is a sale of real estate in a deed of trust after the death of the grantor, the surplus goes to his heirs, unless the deed of trust otherwise provides, and disregards the contention of the distributee that by the use of the words "personal representatives or assigns" and by the failure to use the word "heirs," as is ordinarily done in such conveyances in providing for the distribution of the surplus, the grantor by her deed directs that whenever there is a conversion by sale, the surplus is to be distributed as personalty. The court construed the words "personal representatives or assigns" to mean merely the legal representative of the grantor, in such case the administrator, and further held that real assets to come into the hands of the administrator

and that it is his duty to deliver such assets to the person entitled thereto, and that such assets need not be distributed as personalty.

"The words 'personal representative' shall be construed to include the executor of a will or the administrator of the estate of a decedent, the administrator of such estate with the will annexed, the administrator of such estate, unadministered by a former representative, whether there be a will or not, a sheriff, sergeant, or other officer who is, under the order of a court of probate, to take into his possession the estate of a decedent and administer the same, and every other curator or committee of a decedent's estate, for or against whom suits may be brought for causes of action which accrued to or against the decedent." Virginia Code, tit. 2, ch. 2, § 5.

"The phrase legal representatives,' in the commonly accepted sense, means the 'administrators' or 'executors,' but that this is not the only definition; that it may mean 'heirs,' 'next of kin,' or 'descendants,' and sometimes 'assignee' or 'grantee;' that the sense in which the term is to be understood depends somewhat upon the intention of the parties using it, and it is to be gathered, not always from the instrument itself, but as well from the surrounding circumstances." Griswold *v.* Sawyer, 125 N. Y. 411, 26 N. E. 464, 465.

"Assigns" is a word comprehending all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act of law. Bailey *v.* De Crespigny, 10 Best & S. 1, 12; Brown *v.* Crookston Agricultural Ass'n, 34 Minn. 545, 26 N. W. 907, 908.